

EVIDENCE: A CANADIAN CASEBOOK

SUPPLEMENT, 2004-05

Hamish Stewart

**Faculty of Law
University of Toronto**



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Additional Problem

Insert at p. 150:

Problem 10

“The accused was charged with trafficking in marijuana. A police officer observed the accused give a woman a small package in exchange for money. The officer stopped the woman and told her that he had just seen her buy marijuana. She opened her purse and gave him a baggie, which was later proved to contain about a gram of marijuana. The conversation between the officer and the woman was not put in evidence, and she was not called as a witness.” *R. v. MacKinnon* (2002), 165 C.C.C. (3d) 73 (B.C.C.A.), headnote. Was the officer’s evidence of the woman’s conduct hearsay?

Corrections

The last paragraph before *B.(K.G.)* on p. 219 should read as follows:

It is not uncommon for a witness’s testimony to differ from an earlier statement that he or she made. The traditional rule was that the prior inconsistent statement was admissible not for its truth, but only to undermine the witness’s credibility, on the ground that the former purpose was hearsay and the latter purpose was non-hearsay. ...

The last paragraph of section B on p. 367 should read as follows:

Traditionally, the prior inconsistent statement of a witness was not admissible for its truth, unless the witness adopted it. ...

Add after *Stillman* on p. 772.

Note on Feeney

In *R. v. Feeney* (1997), 115 C.C.C. (3d) 129, Sopinka J. (La Forest, Cory, Iacobucci, and Major JJ. concurring) said:

[63] ... the first step in the trial fairness analysis is to consider whether the particular evidence is conscriptive or non-conscriptive. In defining non-conscriptive evidence, Cory J. stated at para. 75 [of *Stillman*]:

If the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the *Charter* breach in a form useable by the state), the evidence will be classified as non-conscriptive.

In defining conscriptive evidence, Cory J. stated at para. 80:

Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

.....

[67] ... *Stillman*, following on earlier cases such as *R. v. Burlingham*, [1995] 2 S.C.R. 206, confirmed that evidence may be considered conscriptive if it was found as the result of other conscriptive evidence, typically a statement. A characterization of such evidence as conscriptive, “derivative” evidence is appropriate where the initial conscriptive evidence is a *necessary* cause of the obtention of the derivative evidence. ...

[69] It is important to note the distinction between the test for characterizing evidence as conscriptive, derivative evidence and the test for determining whether conscriptive evidence is discoverable. Discoverability is concerned with whether a *Charter* breach was necessary to the discovery of and obtaining conscriptive evidence. If the conscriptive evidence would have been obtained even if the *Charter* had not been breached, the evidence is discoverable and its admission, despite the conscription of the accused, would not affect trial fairness. In determining discoverability, therefore, the alternative means to obtain the evidence must comply with the *Charter*.

[70] The derivative evidence inquiry, on the other hand, is directed at determining whether a piece of evidence should be viewed as having a conscriptive nature because of its intimate relationship with other conscriptive evidence. Evidence is derivative if it would not have been obtained but for the conscriptive evidence. In analyzing this question, it is not relevant whether the means by which the evidence would have been discovered in the absence of conscription were constitutional. The inquiry is directed at whether evidence should be treated as a product of the accused’s mind or body for the purposes of s. 24(2), which purpose does not depend on the constitutionality of the alternative means of discovery. ...

purpose for which the jury were entitled to use it. Before the Crown began asking questions with respect to the recorded conversation the appellant had with two other convicts, the trial judge interjected. He stated that the jury were only to take the conversation into account so as to test the appellant's credibility. He added that the goal of the testimony was not to establish the truth of the contents of the conversation, but to undermine the appellant's credibility. During his instructions at the conclusion of the evidence, the trial judge very clearly spelled out the law as enunciated in *Kuldip, supra*. He told the jury that the only use they could make of the evidence was in testing the appellant's credibility. He also cautioned the jury not to use the evidence to prove the truth of its contents. As an example, he commented on how the taped conversation was not in evidence at all. If the appellant's present story differed from what was said there, though, the jury could take note of this contradiction so as to gauge the appellant's credibility. This very simple explanation from the trial judge was, in my view, satisfactory.

* * * * *

D. Appellant's Knowledge of the Charter and the CEA

[153] Before concluding these reasons, I feel it necessary to comment on some of Crown counsel's questions respecting the appellant's understanding of the law, and his rights under both the *Charter* and the CEA. For the reasons set out in *R. v. Jabarianha*, 2001 SCC 75, 59 C.C.C. (3d) 1, 206 D.L.R. (4th) 87, these questions were not appropriate. I am, however, of the opinion that the presence of such questions did not have any real effect on the outcome of the appellant's trial. These questions formed only a small part of the Crown's cross-examination. Given the strong evidence contained in the police statements, and given the incessant and legitimate attack on the appellant's credibility, a few questions pertaining to his knowledge of the *Charter* and the CEA are not noticeably prejudicial. As in *Jabarianha*, I would dismiss the appeal by applying the curative provision found in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

Questions on Noël

1. Does Arbour J.'s reasoning in *Noël* affect the authority of *Kuldip* in any way? In particular, would the cross-examination permitted in *Kuldip* still be proper after *Noël*?

2. The two accused, Henry and Riley, were charged with murder. They broke into a home where marijuana was being grown, intending to rob it, and found the victim inside the house. In the course of the robbery, the victim was tied to a chair when his head was covered in duct tape. There was no question that the accused were, at a minimum, guilty of manslaughter. At their first trial, both accused testified in support of a defence of intoxication. The jury rejected the defence and the accused were both convicted of second degree murder. The Court of Appeal ordered a new trial. At the second trial, both accused testified again, but their evidence differed significantly from their evidence at the first trial. Henry continued to advance a defence of intoxication, but now said that he had been extremely intoxicated and could barely remember what had happened in the house. Riley resiled from the defence of intoxication, and testified that he had been only minimally involved in the taping of the victim's head. In light of *Noël*, should the Crown be permitted to cross-examine the accused on their testimony from the first trial? See *R. v. Henry* (2003), 179 C.C.C. (3d) 307 (B.C.C.A.).

